

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
JUSTUS SHAKE COMPANY,)
)
Appellant,)
)
v.)
)
OLYMPIC AIR POLLUTION)
CONTROL AUTHORITY,)
)
Respondent.)

PCHB No. 77-95

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of two civil penalties totaling \$250 for the emission of particulates allegedly in violation of respondent's Section 10.01(4)(c) of Regulation I, came on for hearing before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, Members, convened at Lacey, Washington on January 17, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by and through its attorney David V. Johnson; respondent appeared by and through its attorney Fred D. Gentry. Olympia

1 | court reporter Eugene E. Barker provided reporting services.

2 | Witnesses were sworn and testified. Exhibits were examined. A
3 | proposed Findings of Fact, Conclusions of Law and Order was issued
4 | February 9, 1978. The Board having received exceptions to said proposed
5 | Findings, Conclusions and Order from appellant and reply to these
6 | exceptions by respondent, and having considered same and denied
7 | appellant's exceptions; and the Board being fully advised in the
8 | premises, makes these

9 | FINDINGS OF FACT

10 | I

11 | Respondent, pursuant to RCW 43.21B.260, has filed with this
12 | Hearings Board a certified copy of its Regulation I containing
13 | respondent's regulations and amendments thereto of which official
14 | notice is taken.

15 | II

16 | Appellant owns a cedar shake mill near Forks, Washington which it
17 | began operating in 1964. Operations began with a "wigwam" style waste
18 | wood burner which is a design predating environmental concerns. With
19 | the advent of respondent's air pollution regulations around 1970,
20 | appellant experimented with several waste wood burners, eventually
21 | settling on a "silo" type burner. This type of burner was tested by the
22 | State Department of Ecology and found to meet air pollution control
23 | standards when properly operated.

24 | III

25 | On April 18, 1977 the respondent air authority (OAPCA) received
26 | a complaint that wood particles were being emitted by appellant's burner

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1 and were falling onto adjacent residential lots. Two OAPCA inspectors
2 visited the scene and there observed individual burned and unburned
3 sawdust particles, about 1/32 of an inch in length, blowing upward from
4 appellant's burner. These particles fell upon the residential lots of
5 the Gale and Warren families located adjacent to and south of the
6 appellant's burner. The particles fell upon the Warren's house, boat,
7 car and picnic table, as well as the yard areas, as has been the case
8 for the last several years. In the past, the falling particles have
9 been the cause of four or five fires in vegetation on the Warren
10 property. The OAPCA inspectors served a Notice of Violation upon
11 appellant at the scene. Appellant later received a Notice of Civil
12 Penalty Assessment citing Section 10.01(4)(c) of respondent's
3 Regulation I and imposing a civil penalty of \$100.

14 IV

15 On April 20, 1977 two OAPCA inspectors returned to the scene at
16 the invitation of the appellant who proposed to demonstrate that the
17 falling particulate had its source at some other burner than its own.
18 The OAPCA inspectors arrived at 8:15 a.m. when, as a test, the appellant
19 was not operating its burner. No particulate fallout was observed. By
20 9:00 a.m. waste wood in the burner drew near a level beyond which the
21 burner might not operate properly. The burner was started and
22 particulate fallout, of the same kind as previously observed, rose upward
23 from appellant's burner and fell onto the adjacent Warren lot. Appellant
24 later received another Notice of Civil Penalty Assessment citing Section
25 10.01(4)(c) and imposing another civil penalty, this one in the amount
.0 of \$150.

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V

After the violations now alleged, appellant applied for and obtained a variance from OAPCA to gain sufficient time to add pollution control equipment. Appellant then added a steel screen to its burner in June or July, 1977 for the purpose of controlling wood particle fallout.

VI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

In its Notice of Appeal appellant requests a stay of the assessed civil penalties pending final determination of this appeal. Such a stay is automatic under RCW 70.94.431.

II

Section 10.01(4)(c) of respondent's Regulation I states:

No person shall cause or allow the emission of particles of such size and nature as to be visible individually in sufficient number to cause annoyance to any other person. This restriction to apply only if particles fall on real property other than that of the person responsible for the emission.

This regulation is essentially a restatement of common law trespass in that it prohibits the physical invasion of the real property of another. However, some physical invasion is permitted if the number of particles is insufficient "to cause annoyance to any other person." In construing this last clause we will give effect to the plain meaning of respondent's Regulation I and all of its terms.

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1 At Section 1.01 it is declared that the policy of OAPCA is to
2 "secure and maintain such levels of air quality as will protect human
3 health and safety; and, to the greatest degree practicable, prevent
4 injury to plant and animal life and to property" The antithesis
5 of this policy is "air pollution" which is defined in Section 1.07 as
6 the presence in the outdoor atmosphere of an air contaminant which is
7 "injurious to human health, plant or animal life, property, or which
8 unreasonably interferes with enjoyment of life and property." (Emphasis
9 added.) Accord RCW 70.94.030(2). The annoyance caused by the physical
10 invasion of real property must therefore be "unreasonable" if Section
11 10.01(4)(c) is to be consonant with the quoted policy of Regulation I.
12 This end is obtained by the clause requiring "annoyance to any other
13 person" which we construe to mean an unreasonable annoyance to any
14 person of ordinary and normal sensibilities. See Cudahy v. Puget Sound
15 Air Pollution Control Agency, PCHB No. 77-98 (1977).¹

16 We conclude that appellant, on both April 18 and 20, 1977, emitted
17 particles of such size as to be visible individually and that the same
18 fell onto the real property of another in sufficient quantity to
19 unreasonably annoy a person of ordinary sensibilities, and that appellant
20 therefor violated Section 10.01(4)(c) on both dates.

21
22 1. It matters not for purposes of finding a violation, under
23 Section 10.01(4)(c), that one emitting particulates onto the real property
24 of others has taken all feasible precautions to prevent it. The
25 infeasibility of preventing particle fallout on others would be more
appropriately considered in a variance proceeding. Such precautions as
have been taken may also be considered in mitigating a civil penalty. See
Cudahy v. PSAPCA, PCHB No. 77-98 (1977), at pp. 9-10.

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III

Appellant contests the validity of Section 10.01.4(c) by alleging that it is contrary to the Constitution of the United States and contrary to or beyond the scope of the Washington Clean Air Act, chapter 70.94 RCW. The burden of establishing the invalidity of a regulation rests with the party asserting the invalidity. Letterman v. Tacoma, 53 Wn.2d 294, 333 P.2d 650 (1958).

Constitutionality. This Hearings Board declines to rule upon a constitutional issue because "an administrative tribunal is without authority to determine the constitutionality of the statute" Yakima Clean Air Authority v. Glascom Builders, Inc., 85 Wn.2d 255, 257 (1975). The Pollution Control Hearings Board is such an administrative tribunal. Id. at 264. RCW 43.21B.010, 43.21B.020. If we were to rule however, we would reject appellant's contention that the regulation before us, Section 10.01(4)(c) is unconstitutionally vague. A regulation is void for vagueness only if men of common intelligence must guess at its meaning and differ as to its application. State v. Malone, 9 Wash. App. 122, 511 P.2d 671 (1973). In the instant case, one of common intelligence need not guess at the meaning of "particles . . . visible individually" falling on "real property" of others. Neither should there be doubt concerning the words "annoyance to any other person" in light of our interpretation establishing the requirement of an "unreasonable annoyance to any person of ordinary and normal sensibilities." Such a standard is no more vague than many well accepted standards of common law and statute. See State v. Primeau,

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1 70 Wn.2d 109 (1966); State v. Reader's Digest Ass'n, 81 Wn.2d 259;
2 501 P.2d 290, appeal dismissed; 93 S.Ct. 1927, 411 U.S. 945, 36 L.Ed.2d
3 406; Sonitrol Northwest v. Seattle, 84 Wn.2d 588 (1974).

4 Clean Air Act, chapter 70.94 RCW. There is no merit to appellant's
5 contention that the particle fallout regulation, Section 10.01(4)(c), is
6 beyond the scope of the enabling legislation, chapter 70.94 RCW, merely
7 because the regulation states no numerical standard. Nothing in the
8 delegation of regulatory power, RCW 70.94.141 and 70.94.380, limits that
9 power to the adoption of numerical regulations.

10 IV

11 Respondent, OAPCA, has the burden of proving by a preponderance
12 of the evidence that its regulation was violated. Appellant lastly
13 argues that OAPCA cannot carry this burden through the observations of
14 complainants and OAPCA inspectors if "scientific" methods of proof were
15 available. We decline to adopt such a rule preferring instead to
16 weigh all evidence on its own merits, case by case.² In this appeal
17

18 2. Appellant cites two decisions of a lower Pennsylvania court to
19 support its claim that "non-scientific" evidence cannot prove a violation.
20 Bortz Coal Co. v. Air Pollution Commission, 2 Pa.Comwlth 441, 279 A.2d 388
21 (1971); North American Coal Corporation v. Air Pollution Commission,
22 2 Pa.Comwlth 469, 279 A.2d 356, 48 ALR.3d 786 (1971). In both those
23 cases the pertinent air pollution regulation imposed numerical standards
24 (Ringelmann and ground concentration of particulate). The proof consisted
25 of the testimony of witnesses concerning their casual observations whereas
26 recognized methods existed for computing both numerical factors set out in
27 that regulation.

Here, by contrast, the pertinent air pollution regulation, Section
10.01(4)(c), does not contain a numerical standard nor is it required to.
Likewise, there is no evidence of any recognized method, more scientific
than the observations employed, for tracing only particles "visible
individually" from a burner to their landing place.

These differences in the regulation alleged and in the state of
scientific methods available to prove a violation, make the rule adopted
by the Pennsylvania court, and offered by appellant, inappropriate in the
case before us.

1 OAPCA has carried its burden of proof by a generous submission of relevant,
2 probative evidence.

3 V

4 In view of the appellant's subsequent attempts to abate the
5 particle fallout by use of screens, and in view of the high level of
6 waste wood in the burner during voluntary testing on April 20, 1977, the
7 penalties imposed should be suspended in part.

8 VI

9 Any Finding of Fact which should be deemed a Conclusion of Law
10 is hereby adopted as such.

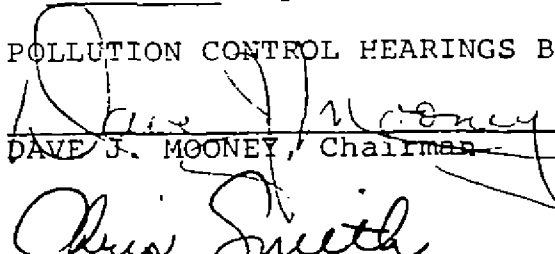
11 From these Conclusions the Pollution Control Hearings Board
12 enters this


13 ORDER

14 The \$100 civil penalty relating to April 18, 1977 is affirmed.
15 The \$150 civil penalty relating to April 20, 1977 is affirmed, provided
16 however, it is suspended on condition that appellant not violate
17 respondent's regulations for a period of one year from the date of
18 appellant's receipt of this Order.

19 DONE at Lacey, Washington, this 24th day of March, 1978.

20 POLLUTION CONTROL HEARINGS BOARD

21 
22 DAVE J. MOONEY, Chairman

23 
24 CHRIS SMITH, Member

25
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